NCN: [2019] EWCA (Crim) 2053
No: 201902116 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 6 November 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE WARBY

HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the CACD)

R E G I N A
v
PETER MYTHEN

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Miss Charlotte Oliver appeared on behalf of the **Appellant**

J U D G M E N T

LORD JUSTICE SIMON:

1. On 16 April 2019 the appellant, aged 53, pleaded guilty in the Magistrates' Court and was committed for sentence to the Crown Court at Isleworth. On 16 May he was sentenced by His Honour Judge Simon Davis to a term of 10 years' imprisonment for the offence of importing class A drugs. A Travel Restriction Order was also imposed for a period of two years after his release from custody. He appeals against that sentence with the leave of the single judge.

2. Shortly before 9.20 on the morning of 14 April 2019, the appellant arrived at St. Pancras International Terminal on a Eurostar train from Paris and was questioned by Border Force Officers. He told them that he had initially travelled from the United Kingdom to Martinique where he spent nine days, before stopping off in Paris for one day on his return. He said that the purpose of the trip had been for a holiday which he had paid for himself. He said that he lived in Manchester and worked as a carpenter.

3. He had four items of luggage: a large brown suitcase, a large black suitcase and two smaller suitcases, also brown and black. The large black suitcase was empty but appeared heavier than might be expected. Officers pierced the side of the suitcase and found cocaine. Further tests showed that each suitcase had cocaine concealed in the lining. The total weight of the drugs was 7.21 kilos at 62 per cent purity. The street value was assessed at £594,373.

4. The appellant was interviewed by police on 15 April and answered no comment to all questions, other than to confirm that he lived alone in Manchester, he had withdrawn €200

and the €150 in his wallet was his own money. He had not eaten much while he was away.

5. He was aged 53 at the date of sentence. He had 13 convictions for 28 offences, spanning August 1978 to December 2001. The majority of his previous offending, with the exception of one offence of assault occasioning actual bodily harm in 1999, were acquisitive or motoring offences. He had one previous drug conviction for possession of a controlled drug of class B from 1996. There was no pre-sentence report.

6. The judge recorded that he had been told by the appellant's counsel that there had been a background of pressure in relation to the offence. He observed that the world of drugs was murky and brutal, and that 7.21 kilos of cocaine with a street value of just under £600,000 was "a horrible amount of drugs to release onto the streets".

7. A pre-sentence report was not required. There was no alternative to a lengthy sentence of imprisonment. The judge did not find that the background provided by counsel was mitigation to a material degree. It was a Category 1 case. The starting point for five kilograms was 10 years with a range of nine to 12 years. However, he would be failing in his duty if he did not mark the fact that the appellant had 2.1 kilos more than the five kilogram starting point in the guidelines.

8. The appellant's previous convictions were a consideration but his last conviction was 18 years ago and for dissimilar offending. The judge concluded that the appropriate sentence after a trial would have been 15 years' imprisonment. He was entitled to full credit for his plea and the sentence was therefore 10 years' imprisonment. After some

discussion the judge then imposed the Travel Restriction Order.

9. In the grounds of appeal and before us today, Miss Charlotte Oliver accepts that the sentence falls to be assessed on the basis that the appellant had a significant role in a Category 1 offence and that the starting point was therefore a term of 10 years and a range of nine to 12 years. However, she submits that there was no sufficient justification to increase that sentence by 50 per cent to take into account that the 10-year starting point relates to a five-kilogram importation and the appellant had attempted to import 7.21 kilograms. Furthermore, she submits that there was mitigation in the form of "involvement due to pressure, intimidation or coercion falling short of duress". That was a matter that was raised before the judge but not pursued with an application for a *Newton* hearing. She also contends that the two-year restriction on travel was disproportionate.

10. The judge rightly assessed the offending as a significant role in a Category 1 offence, based on five kilograms of cocaine. He then increased the starting point to 15 years because it was over seven kilograms. We are quite clear that this was not the right sentencing approach. First, an arithmetic progression of this sort would suggest a starting point of 20 years if the importation was 10 kilograms and 30 years if the importation was 15 kilograms. Second, it would be treating the offending as more serious than if the appellant had had a leading role in a Category 1 importation, in which case the starting point would be 14 years and the range 12 to 16. In our view, balancing the relevant factors justified adopting a starting point within the range of 9 to 12 years but not above.

11. At step 2 his previous convictions might have been a factor increasing the seriousness but,

as the judge rightly concluded, not here. There were potential factors reducing seriousness or reflecting personal mitigation: the offender's account of coercion, intimidation or exploitation short of duress, but the judge never heard any evidence about that. The appellant was offered the opportunity to give evidence but declined to do so.

12. It follows that with full credit the sentence should have been a term of eight years. We are not persuaded that there was anything wrong with the Travel Restriction Order. It follows that the appeal succeeds to this extent. We quash the sentence of 10 years and substitute a term of eight years in its place.